United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1912

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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P/S

UNITED STATES OF AMERICA, Appellee, -against- GEORGE FLORES, Appellant.	Docket No. 74-1912

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

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QUESTION PRESENTED

Whether the Government violated the Prompt Disposition Rules by failing, without valid excuse, to be ready for trial within six months of appellant's arrest.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (Stewart, J.)

rendered on June 21, 1974, after a jury trial, convicting George Flores of one count of unlawfully possessing an unregistered firearm, in violation of Title 26 U.S.C. §§ 5861(d) and 5871; and one count of unlawfully possessing an illegally made shotgun, in violation of Title 26 U.S.C. §§ 5822, 5861(c) and 5871; on the count of unlawfully transferring an unregistered firearm the jury was unable to reach a verdict and the court declared a mistrial as to said count.

Appellant was sentenced to imprisonment for a period of two years on each count, to run concurrently.

Counsel herein was assigned under the Criminal Justice Act; counsel was the trial attorney having also been assigned under the Criminal Justice Act.

Statement of Facts

On October 15, 1973, appellant was arrested in Puerto Rico pursuant to a complaint and warrant issued on August 27, 1973 out of the Southern District of New York. After a hearing and removal from Puerto Rico to the Southern District of New York, appellant was brought before Magistrate Goettel at which time he was informed of the pending charges and bail was set at $10,000 Personal Recognizance Bond to be secured by $1,000. Appellant was not able then nor through the entire proceedings below to post bail.

On December 21, 1973, appellant was indicted and charged in a three count indictment with: unlawful possession of an unregistered firearm, unlawful possession of an illegally made firearm, and unlawfully transferring a firearm without complying with the registration requirements.

On December 27, 1973, appellant was arraigned and the case was assigned to Hon. Charles B. Stewart, with ten days for motions.

On January 11, 1974, the Government served upon appellant's counsel its "Notice of Readiness for Trial" wherein the Government noticed the case for trial on or after January 22, 1974; the trial actually commenced May 14, 1974, seven months after appellant's arrest. No delay was caused or occasioned by appellant's conduct.

The delay in having this matter tried was occasioned by: the trial judge being unavailable from January 22, 1974 through May 9, 1974 (for the first three weeks he was on vacation and thereafter was engaged as the trial judge in the case of United States v. Riland). In an attempt to bring the case to trial, on or about April 1, 1974 Judge Stewart referred the case to the Assignment Committee of the District Court, which in turn referred the matter to Senior District Court Judge Levet. On or about April 3, 1974, Judge Levet scheduled a pre-trial

conference for April 11, 1974. On April 9, 1974, Judge Levet cancelled the April 11 conference and adjourned it to April 18. On April 17, Judge Levet cancelled the pre-trial conference of April 18 and rescheduled it for May 2. On April 30, Judge Levet cancelled the May 2 conference, informing counsel he was too ill to try the case and that he was referring the case back to Judge Stewart.

On May 9, 1974, appellant moved to dismiss the indictment on the ground that the Prompt Disposition Rules had been violated because of the aforestated facts.* The motion was denied** and the trial was commenced on May 14, 1974.

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* The proceedings of May 9, 1974 were not transcribed (although recorded). Counsel for appellant will supply to the Court the transcription of said proceedings on or before argument of the appeal.

** Appellant's appendix at page A3 (hereinafter "A" followed by page reference.

ARGUMENT

THE GOVERNMENT VIOLATED THE PROMPT DISPOSITION RULES BY FAILING, WITHOUT A VALID EXCUSE, TO BE READY FOR TRIAL WITHIN SIX MONTHS OF APPELLANT'S ARREST

As heretofore stated, appellant was arrested on October 15, 1973 and brought to trial on May 14, 1974 - a delay of more than seven months.

Rule 4 of the Plan* requires the Government to be ready for trial within six months of appellant's arrest, unless it

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* 4. All Cases: Trial Readiness and Effect of Non-Compliance.

In all cases the government must be ready for trial within six months from the date of arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with a non-capital offense, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-month period under one or more of the exceptions in Rule 5, the motion shall be denied, whether or not the government has previously requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days.

can demonstrate the reason its non-compliance was due to excusable neglect (Rule 4 of the Plan), or other allowable exceptions to the six month rule (Rule 5 of the Plan).

Under Rule 5 of the Plan, the following excludable periods are not applicable to this matter: 5(a) - no delay due to any pre-trial proceedings; 5(b) - no continuance of the trial was ever asked for by appellant; 5(c) - no continuance was ever applied for by the prosecuting attorney; 5(d) - appellant was neither absent nor unavailable during the pendency of the proceedings below; 5(e) - there was no joinder or severance problem involved in the proceedings as appellant was individually charged in the complaint and in the indictment; 5(g) - appellant was never without the assistance of counsel.

The only provisions of Rule 5 that colorably come into play in this appeal are Rules 5(f) and (h).*

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* Rule 5. In computing the time within which the government should be ready for trial under rules 3 and 4, the following periods should be excluded: *** (f) the period of delay resulting from detention of the defendant in another jurisdiction provided the prosecuting attorney has been diligent and has made reasonable efforts to obtain the presence of the defendant for trial.*** (h) other periods of delay occasioned by exceptional circumstances.

With reference to Rule 5(f), appellant was arrested on October 15, 1973 in Puerto Rico. For a period of eleven days appellant was incarcerated in Puerto Rico, while awaiting a Rule 40 probable cause and identity hearing. On October 26, 1973, an order was entered commanding the removal of appellant from the District of Puerto Rico to the Southern District of New York.* The period of delay caused by said removal proceedings consumed a delay of eleven days. Rule 5(f), therefore, would not operate to excuse the failure of the Government to bring to trial his case within six months.

Rule 5(h) is the non-specific rule which permits the Government to run beyond the six month period because of "exceptional circumstances." The question herein is whether this Court adopts the view that the Government is excused from complying with the six month rule where the assigned judge and his successor are not able or available to preside over a trial even where the parties are ready, willing and able to so proceed. Posed differently, the question is what affirmative duty does the Government have to see to it that a ready

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* Order of John M. Garcia, United States Magistrate for the District of Puerto Rico (Magistrate's Case No. 6-179); the order fixed bond on the removal in the amount of $10,000; appellant was unable to post bail as fixed by the Magistrate.

"jail case" is tried within six months of the arrest of a defendant. It is submitted that the answers to these questions must be answered by a strict adherence to the language and policy of this Circuit's prompt disposition of criminal cases rules.

Recalling the facts of this case, appellant was indigent, and, therefore, could not make any of the bails during the pendency of the proceedings below.* He never requested a continuance for any purpose and was ready for trial at all times after his arraignment on December 27, 1973. He was ready to be tried within the time frame proposed by and contained in the Government's "Notice of Readiness for Trial." He did not receive a prompt trial because of the convergance of two factors - totally outside of his control, namely the inability of the Government to find a trial judge who was ready and willing to preside over his case and the refusal of a second judge to adhere to a schedule that would have resulted in a trial within the six month period.

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* Ten thousand dollars cash or surety set by Magistrate Garcia, D.C.P.R. (October 26 - November 26, 1973); $10,000 P.R.B. secured by 10%, set by Magistrate Goettel, S.D.N.Y. (November 27, 1973); $10,000 P.R.B., secured by 10%, set by Carter, J. S.D.N.Y. (December 27, 1973 - February 11, 1974); $10,000 P.R.B., secured by 5%, set by Lasker, J. (February 11, 1974 and continuing until appellant's sentence.

The law of this Circuit appears at first glance to be against appellant; see, e.g., United States v. Cacciatore, 487 F.2d 240 (1973); United States v. Tirinkian, 488 F.2d 873 (1973); United States v. Atkins, Slip Op., Docket No. 73-2802 (decided June 6, 1974). It also appears that this Circuit has adopted as critical to any inquiry of an alleged violation of its rules whether the Government has served (or filed) a statement of readiness for trial within six months (e.g., United States v. Pierro, 478 F.2d 386 (1973); United States v. Flores, Slip Op., Docket No. 74-1186 (decided August 7, 1974)).

However, the guiding principle for a decisional interpretation of its rules was articulated by the Circuit (en banc) in Hilbert v. Dooling, 476 F.2d 355 (1973):

> In summary, the Rules are designed to require the government to be ready to try cases promptly, subject to certain types of delay generally arising from legitimate or unavoidable causes. The purpose of Rule 4 is to insure that regardless whether a defendant has been prejudiced in a given case or his constitutional rights have been infringed, the trial of the charge against him will go forward promptly instead of being frustrated by creeping, paralytic procedural delays of the type that have spawned a backlog of thousands of cases, with the public loosing confidence in the courts and gaining the impression that federal criminal laws cannot be enforced.
>
> 476 F.2d at pp. 357-358.

Appellant submits that the delay of his trial was not unavoidable; the Government (including the District Court's assignment committee) should have made every effort to have the case again reassigned to a District Court Judge who would have been able to try the case, or at the very least informed appellant as to the condition of the judge to whom the case had been reassigned (it was only immediately before the third scheduled pre-trial conference that appellant's counsel was informed that Judge Levet was too ill to hear and try his client's case).

The Government has the ultimate responsibility to see to it that the Rules are followed; it should have been more diligent in this case and have at least attempted during the fifth month of the pendency of the proceedings below to secure or attempt to secure an available District Court Judge who would convene a trial within six months; the Government's failure to do so is an unexcusable violation of the Rules requiring dismissal of the indictment, with prejudice.

CONCLUSION

For the above-stated reasons, the judgment of the District Court should be reversed and the indictment should be dismissed.

Respectfully submitted,

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Dated: New York, New York
August 19, 1974

CERTIFICATE OF SERVICE

I hereby certify that three copies of the attached brief and three copies of the appendix thereto were mailed this day of Hon. Paul Curran, United States Attorney, Southern District of New York, United States Court House, Foley Square, New York, New York 10007.

Daniel L. Meyers

Dated: New York, New York
August 19, 1974